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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Lynk Systems, Inc.

Serial No. 75/862,400

Scott E. Taylor and Kathryn E. Swint of Arnall Golden &
Gregory, LLP for Lynk Systems, Inc.

Cimmerian Coleman, Trademark Examining Attorney, Law Office
102 (Thomas Shaw, Managing Attorney).

Before Seeherman, Quinn and Drost, Administrative Trademark
Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Lynk Systems, Inc. has appealed from the final refusal
of the Trademark Examining Attorney to register LYNK as a
mark for "electronic funds transfer services."¹

Registration has been refused pursuant to Section 2(e)(1)

¹ Application Serial No. 75/862,400, filed December 2, 1999,
asserting first use and first use in interstate commerce in 1991.

of the Trademark Act, 15 U.S.C. 1052(e)(1), on the ground that applicant's mark is merely descriptive of its services.

Before discussing the issue of whether applicant's mark is merely descriptive or inherently distinctive, we address certain procedural points. In its appeal brief applicant requested that, if the Board should affirm the refusal of registration, it wished to pursue, in the alternative, registration pursuant to the provisions of Section 2(f) of the Act, and submitted a declaration of five years continuous use in support of this position. The Examining Attorney pointed out, in her brief, that such a request was untimely. The Examining Attorney is correct. Although an applicant may assert that its mark is inherently distinctive and, in the alternative, that it has acquired distinctiveness, it must do so during the examination phase. Thus, if applicant wanted to assert a claim of acquired distinctiveness, it should have requested remand of the application so that the Examining Attorney could have considered the claim.

However, after the filing of applicant's reply brief, applicant submitted a request for remand so that its alternative claim of registration pursuant to Section 2(f) could be considered, and indicated that the Examining

Attorney had given her consent thereto. As a result, the Board remanded the application to the Examining Attorney, who accepted the amendment. Thus, the appeal before the Board is solely on the issue of whether LYNK is inherently distinctive or merely descriptive of the identified services.

One additional procedural point must be noted. With its reply brief applicant submitted copies of 48 registrations for "LINK" marks in support of its position that LYNK is inherently distinctive. These registrations are manifestly untimely. As the Examining Attorney had previously pointed out in her brief, the record in the application should be complete prior to the filing of the appeal. See Trademark Rule 2.142(d). Applicant's request for remand, which occurred subsequent to the filing of the reply brief, and the Board's granting thereof, was specifically for the purpose of considering applicant's claim of acquired distinctiveness, and did not serve to make the third-party registrations of record.

This brings us to the substantive issue involved in this appeal.

It is the Examining Attorney's position that LYNK is merely descriptive of electronic funds transfer services because it would readily be perceived as "LINK," its

phonetic equivalent, and that "link" describes a characteristic of the services, in that it refers to a computerized system that allows a user to link or connect to a network. In support of her position, she has submitted excerpts of articles taken from the NEXIS database, including the following:

...banks have invested heavily in the technology that has made ATMs almost ubiquitous. That investment has been not just in the purchase and maintenance of the machines themselves, but in sophisticated computer systems and electronic funds transfer systems that allow banks to electronically link through regional, national and global networks.

"Denver Rocky Mountain News," March 19, 2000

PULSE is a shared electronic funds transfer network that links cardholders with ATMs and point-of-sale terminals.

"Texas Lawyer," September 11, 2000

PULSE EFT Association, Houston, an electronic funds transfer network that links more than 2,000 financial institutions and 20 million of their customers with ATMs and PULSE Pay POS installations....

"Computer Reseller News," January 10, 2000

...the market for mobile machines is quickly moving into nonremote, fixed locations by using proprietary wireless communications links designed for electronic funds transfer systems instead of voice communications.

"ATM & Debit News," April 13, 2000

and a dictionary definition for "link": "*Computer Science*. An identifying term attached to an element in a system to facilitate connection to other identified elements."² In addition, the Examining Attorney has pointed to the following language in applicant's specimen brochure:

Lynk offers a variety of communication connectivity supported by two different networks, Sprint and TNS, offering full redundancy at the merchant level. ...

The technology, connectivity and back office support provide superior processing—every transaction, every day.

Applicant has explained that it offers a service to merchants who wish to offer their customers the ability to pay by credit cards and debit cards. By using electronic funds transfer services such as applicant's, merchants can accept their customers' credit and debit cards as a form of payment for their goods and services. Applicant authorizes and settles these transactions as between the merchants, issuing banks, and the credit and debit networks. See reply brief, p. 1.

A mark is merely descriptive, and therefore prohibited from registration by Section 2(e)(1) of the Trademark Act,

² The American Heritage Dictionary of the English Language, 3d ed. © 1992.

if it immediately conveys knowledge of the ingredients, qualities or characteristics of the goods or services with which it is used. See **In re Gyulay**, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987).

We find that LYNK is merely descriptive of electronic funds transfer services. Despite the slight misspelling, consumers would immediately recognize LYNK to be the equivalent of "link." It is the phonetic equivalent of this word, and because it differs from "link" only in the second letter, a vowel, the words are very similar in appearance. And the evidence of record demonstrates that "link," when used in connection with electronic funds transfer services, describes a characteristic of such services, namely, that they are linked to a network or system.

Applicant argues that "it would be virtually impossible for a consumer to determine the nature of Applicant's services from the term 'lynk' or 'link'", brief, p. 2, and that "it would be virtually impossible for someone to guess the nature of Applicant's services from the term LYNK", brief p. 3. However, this argument ignores the well-settled principle that the question of whether a particular term is merely descriptive must be determined not in the abstract, but in relation to the goods or

services for which registration is sought, the context in which the mark is used, and the significance that the mark is likely to have, because of the manner in which it is used, to the average purchaser as he encounters goods or services under the mark in the marketplace. **In re Engineering Systems Corp.**, 2 USPQ2d 1075 (TTAB 1986).

Applicant attempts to distinguish the NEXIS excerpts submitted by the Examining Attorney by stating that they show only that the term "link" is used with electronic funds transfer systems or networks, and that applicant is attempting to register LYNK for electronic funds transfer services. Applicant asserts that a customer would have to first recognize that electronic funds transfer services are carried out through a network that facilitates the electronic transfer of funds, and only after that might a consumer envision such a network as providing a series of links. Applicant asserts that this process shows that LYNK is suggestive, not merely descriptive.

The difficulty with this argument is that the consumers for applicant's services, as applicant acknowledges, are merchants who accept credit and debit cards, and would be knowledgeable about the manner in which applicant's services are rendered. In fact, applicant's brochures, which are directed to merchants, tout the

connectivity and networks in terms of the superior processing that applicant provides. Such consumers would know that electronic funds transfer services are carried out using a network, and would immediately understand that LYNK, when used with such services, describes a characteristic of the services.

As for the language in the specimen brochure, applicant argues that the brochure's focus is on the speed, convenience and flexibility of applicant's electronic funds transfer services, that the references to connectivity are within a discussion of a few technical aspects behind applicant's services, and that these "behind the scenes" aspects of applicant's support services are secondary to its main function. We disagree. The fact that applicant has noted these aspects of its services, and has, in fact, featured the communication connectivity as the first heading on the back page of its four-sided brochure (one sheet, folded in half to form four pages), shows that the link to networks is not an insignificant feature of the services. Moreover, the NEXIS excerpts show that such linkage is a major characteristic of electronic funds transfer services in general.

We have also considered applicant's evidence in support of its position that its mark is inherently

distinctive, namely, five third-party registrations for marks which include the term LINK.³ However, only one of these registrations, for "banking services, namely, accessing of customer accounts by computer," is even remotely related to electronic funds transfer services, and we cannot conclude that the Office has a policy of recognizing LINK as a distinctive term based on this single registration. See **In re Nett Designs Inc.**, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001).

In conclusion, we find that LYNK is merely descriptive of electronic funds transfer services, and is not entitled to registration as an inherently distinctive mark, without resort to Section 2(f).

Decision: The refusal of registration pursuant to Section 2(e)(1) is affirmed. However, because the Examining Attorney had previously accepted applicant's alternative basis for registration, namely, applicant's claim of registrability pursuant to Section 2(f) of the Act, the application will go forward on that basis, and will be published for opposition with the Section 2(f) claim.

³ As noted previously, the third-party registrations which were submitted with applicant's reply brief are untimely and have not been considered. Only five registrations were properly submitted during the application's examination stage.